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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1119

INDIANA EMPLOYMENT SECURITY DIVISION, JOHN F. COPPES, individually and as Director of the Indiana Employment Security Division; VAN SMITH, MAX WRIGHT, and ALBERT SUMMERS, individually and as members of the Indiana Employment Security Board, KENNETH M. SWAIN, individually and as Manager of the Fort Wayne Branch of the Indiana Employment Security Division,

Appellants,

v.

ESSIE D. BURNEY,

Appellee

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division

APPELLANTS' REPLY TO APPELLEE'S MOTION TO AFFIRM

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The Motion to Affirm is quite long. Only certain basic uestions will be discussed here.

The Motion to Affirm incorrectly states the Indiana law to the determination procedures. As shown in the Jusdictional Statement (Jur. Stat.) at pp. 5-6, Indiana law rovides that when an unemployed person files an initial aim for benefits, a determination of his or her status as an nsured worker must be made. I.C. 1971, 22-4-17-2(a), as set ut at p. B-1 of Jur. Stat. That determination of insured tatus does not and cannot establish eligibility for any fu-

ture weeks. Rather, eligibility is determined weekly by a claims deputy on the basis of facts available for that week. I.C. 1971, 22-4-17-2(d), as set out at Jur. Stat., p. B-2. Thus, there is no "termination" or "suspension" of benefits and no reversal of a previously made administrative determination.

When Mrs. Burney was determined by the claims deputy to be ineligible for benefits for a certain week and until she held herself fully available for work, the issue of her eligibility for that period of time was first heard. No decision could have been made prior to that time because the prerequisites of eligibility included her behavior during that time—i.e. whether, during that week, she was physically and mentally able to work, available for work, and was making a good-faith effort to secure work. I.C. 1971, 22-4-14-3, set out in relevant part at Jur. Stat., p. 6.

This identical issue arose in the case of *Torres v. New York State Department of Labor*, 333 F.Supp. 341 (D.C.S.D. N.Y. 1971), affd. — U.S. —, 40 Law Week 3415, and it was there held that a determination as to a week of unemployment subsequent to the original determination was proper without an extended evidentiary hearing. A mere interview proceeding, similar to that described in *California Department of Human Resources v. Java*, 402 U.S. 121 (1971), was held suitable in that case, and that holding was affirmed by this Court, even though the facts of that case were significantly more favorable to the claimants therein than is true of this case. The New York law, as described in an earlier decision in the *Torres* case, 321 F.Supp. 432 (1971), did not speak of weekly determination of eligibility, contrary to the Indiana law. In addition, in *Torres*, one issue in dispute was the cause for separation. Thus there was, in that case, a redetermination of an issue previously decided. In this case, the only issue was Mrs. Burney's activities during a period after the determination of insured status.

It is true that not all claimants are intensively interviewed each week as to whether they actually meet all eligibility requirements. They are required to register each week, though, and the registration process includes a signed statement by the claimant as to the eligibility requirements. Indiana Employment Security Division, Unemployment Division, *Unemployment Compensation Claims Manual*, § 13620. This section provides that it will be unnecessary to question the claimant in detail each week, but that answers will be ascertained to certain basic questions of eligibility. The section is set out in full in the appendix hereto.

It was pointed out at Jur. Stat., p. 10, that because of the volume of claims involved, some summary method of determination must be used for most of the cases in which there is less likelihood of doubt as to eligibility. The fact that some eligibility determinations are made summarily on the basis of a signed statement by the claimant does not negate the law of Indiana or the fact that there actually is a weekly determination of eligibility.

No reply is thought necessary to the long argument that, on the whole, unemployment compensation is a good thing. That view is shared by the Division. The issue is, rather, whether the Division is operating in compliance with the federal law and constitutional requirements.

It has been shown above and in the Jurisdictional Statement that the Indiana procedure is in compliance with the "payment when due" requirements of federal law, since the only determination ever made for the weeks in question was that payment was *not* due. It is also necessary to consider the constitutional arguments advanced in the Motion to Affirm.

It is assumed in the Motion to Affirm that this Court, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), set out hearing requirements which are equally applicable to all administrative proceedings affecting any benefits whatever. The *Gold-*

berg procedures do not have this far reaching applicability. This proposition can best be demonstrated by reference to this Court's opinion in *Daniel, Director, Cook County Department of Public Aid v. Goliday,* 398 U.S. 73 (1970), wherein this Court refused to automatically extend *Goldberg,* which dealt with termination or suspension of public welfare benefits, to cases involving only reduction of those same benefits. Rather, *Goliday* was remanded for further proceedings to develop a record aimed toward that specific issue.

As pointed out in the Jurisdictional Statement, pp. 8-9, the due process concept does not set up a single, unchanging standard of procedure, but requires a separate determination as to each type of situation in which the due process requirement is invoked. A procedure far short of the *Goldberg* requirements was cited with apparent approval by this Court as to initial unemployment compensation eligibility determinations in *Java,* supra. The *Torres* case, supra, also held that procedures such as that urged by the Division complied with the constitutional requirements, and that decision, to repeat what was stated earlier, was affirmed by this Court.

It is thus clear that the decision of the lower court in this case is not so obviously correct as not to require further argument. Rather, it is clearly incorrect. The issues presented in the Jurisdictional Statement are substantial.

It might be further noted that the same issue is involved in the case of *Crow v. California Department of Human Resources Development,* Nos. 71-1045 and 26740 in the United States Court of Appeals for the Ninth Circuit. Counsel for the claimant in that case are also on the Motion to Affirm in this case. Appellants here are informed by counsel for the California agency that they intend to petition to transfer that case directly to this Court so that it might be considered jointly with this case.

CONCLUSION

Appellants respectfully request this Court to deny Appellee's Motion to Affirm and to set the case for plenary consideration, or, in the alternative, summarily reverse the decision of the District Court on the basis of *Torres*, supra.

Respectfully submitted,

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APPENDIX

Indiana Employment Security Division, Unemployment Division, *Unemployment Compensation Claims Manual*, § 13620.

13620 Accepting the Voucher

The claims taker will accept continued claims for benefits, by questioning the claimant, executing the Benefit Voucher, Form 510, and making all entries on the appropriate lines in the benefit period record of Form 506.

All Forms 510 will be prepared as explained on the Instruction Sheets for the preparation of the form and in accordance with the Manual sections pertaining to accepting the voucher. (If the claimant is entitled to benefits from an employer under a SUB Plan, see the Instruction Sheet for preparation of Form 595, Benefit Entitlement Certification.)

The benefit rights interview will have thoroughly acquainted the claimant with the import and content of the statement which he will be required to sign as part of his certification with respect to each week for which he is making a claim. The statement contains all of the elements pertinent to questions of availability and capability. Therefore, it is unnecessary to question the claimant in detail to the same effect with respect to each certification. Consequently, the normal continued claim function will be reduced to:

a. Ascertaining answers to the following questions:
   (1) Did you work anywhere last week? If so, what were your earnings?
   (2) Did you refuse an offer of work?

b. Exploring any obvious question of the claimant's ability to work.

At any time in the accepting of a claim that a potential issue of eligibility or disqualification arises, the claims taker will refer the claimant to a deputy for

the necessary fact finding. In this case a Form 527 and the Form 510 will be transmitted with the claim record card to the deputy.

c. Checking his occupation classification against shortage lists.

Care should also be exercised to assure that the claimant's address has not changed. If the claimant has moved since last reporting, Form 512, Change or Transfer Request will be prepared showing the claimant's new address and will be transmitted to the Benefit Payments Section in the same transmittal with the voucher.